Sustained autonomy - An alternative political status for small islands?

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This article originated as a paper presented at the Pacific Regional Seminar, Port Moresby, Papua New Guinea, 8 - 10 June 1993, of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. Alison Quentin-Baxter first discusses what she sees as the problems with both free association and integration of small island communities. She then advances an alternative model which she labels "sustained autonomy".

I INTRODUCTION

I am grateful to the Special Committee for the invitation to take part in this seminar.[1] It gives me the opportunity to follow up on a suggestion I made at the Asia/Pacific Regional Seminar held at Port Vila, Vanuatu in May 1990. In the paper I gave then, I expressed the view that the Pacific model of free association with an independent State - the only model that has received express United Nations endorsement - has in practice come very close to independence. For some associated States the independence model has so far worked well. For others it has imposed an unduly heavy burden of institutional self-sufficiency, but even so, it may be too late to attempt to put back the clock and start again. I suggested, however, that, with the benefit of hindsight, it might be possible to fashion other models which are perhaps even better suited to the needs of some very small, non-self-governing islands yet to exercise their right of self-determination.

In this paper I shall set out my thoughts about the features of a possible new model. It has elements of free association and also of integration with an independent State. It could therefore be regarded as a Mark 2 version of either. But in order to highlight the fact that neither political status as at present explicitly approved by the United Nations may suit small islands for which independence is not the best, or in some cases a realistic, option, I have coined a new term - sustained autonomy.

It is not very elegant. Someone else may think of a better one. But, used together, the two words "sustained" - in the sense of supported from an outside source as well as continuing indefinitely - and "autonomy" - in the sense of local responsibility for

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1 The report of the seminar is published as UN General Assembly document A/AC.109/1159 dated 1 July 1993.

political decision-making to the full extent desired by the people of the island or island group concerned - capture the essence of the variations on present themes that seem to me to be necessary. I shall try to show that, in the compelling demands of the geography and history of some small non-self-governing islands, as well as in United Nations practice, there is a warrant for such a departure from present orthodoxy.

II WHICH ISLANDS MIGHT BE INTERESTED IN AN ALTERNATIVE STATUS?

My tentative list of islands or island groups that might be interested in an alternative to existing forms of free association or integration, or even an alternative to independence where that is within contemplation, excludes those which seem already to be set on a course that, if carried through, will achieve one or other of those destinies. It also excludes those whose future is clouded by an unresolved territorial dispute. On this basis, the list would consist in the Pacific, of the following: American Samoa, Guam, Pitcairn and Tokelau. I am not sufficiently familiar with the circumstances of the remaining small non-self-governing in the Caribbean - Anguilla, Bermuda, British Virgin Islands, US Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos or of St Helena, in the Atlantic, to know whether they, too, would welcome the opportunity to consider another alternative. Let me emphasise that the choice among all available options must remain that of the people of these small islands or island groups themselves, through an act of self-determination. I have no wish to pre-empt or even to influence that choice. My concern is simply that in some cases the present options may not meet felt needs.

III WHY AN ALTERNATIVE STATUS SHOULD BE CONSIDERED

Elements of the suggested alternative status are already to be found in the existing relationships of a number of small islands in various parts of the world to the State with which they are associated, integrated or otherwise closely linked. These small islands include some which have ceased to be treated as non-self-governing and some whose political status has always been regarded as meeting United Nations norms of self-government. Further aspects of the concept of sustained autonomy set out below may come to apply to them by analogy as these existing relationships are reviewed and developed. But that is a matter outside the jurisdiction of the Special Committee.

My immediate purpose is to put forward some ideas which may help the Special Committee to meet its goal of eradicating colonialism by the year 2000. In some if not all of the small islands I have mentioned, colonial status has persisted until now, I suggest, because it has met the practical need of their people to be able to count on a measure of economic and other support from the administering authority. In a few cases the administering authority is also pursuing interests of its own. But, as I suggest below, the existence of such interests may provide opportunities for the people of small islands which would otherwise be lacking. In many cases, however, administering authorities provide resources for the small islands they administer mainly in recognition of their responsibility under the Charter to do so, without expecting benefits in return

other than those arising from the maintenance of close and friendly ties with peoples to whom they have become closely linked.

There is a danger that, driven by United Nations pressures for the eradication of colonialism, administering authorities may seek to terminate their responsibilities prematurely, or in inappropriate ways, or even to walk away altogether from United Nations supervision. In very small islands that are still non-self-governing, the concern is not the continuation of colonial status. It is the possible ending of that status and with it the ending or substantial reduction of the administering power's present support. The real enemy is not present exploitation. It is future neglect.

I suggest that the United Nations in general and the Special Committee in particular will serve the people of small islands well if it focuses its attention not only on how soon their colonial status can be terminated, but on how they can then be assured that they will have the right to maintain their own special identity and at the same time to receive the continuing economic and other assistance on which their wellbeing depends. I turn now to the reasons why this assurance, necessarily foregone to large degree when the choice is independence, may not be provided by either free association with an independent State or integration with an independent State, as each of these options is at present understood in United Nations doctrine.

IV THE PROBLEMS WITH FREE ASSOCIATION

In the paper I gave at Port Vila, I discussed the Pacific model of free association, applying at the moment to the Cook Islands and Niue, each of which is freely associated with New Zealand, and to the Federated States of Micronesia and the Republic of the Marshall Islands, each of which is freely associated with the United States. My conclusion was that their free association is essentially a form of independence which may or may not prove in the long term to have something added.[2] I shall briefly summarise my reasoning.

First, the international relations of associated States. Contrary to the general impression among commentators, neither New Zealand nor the United States has

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2 This assertion has been borne out by the fact that the Federated States of Micronesia and the Republic of the Marshall Islands have since become members of the United Nations, on 17 September 1991. On the other hand, it appeared from comments made at the seminar that the Commonwealth Covenant between the Northern Mariana Islands and the United States of America is also regarded as a form of self-government in free association with an independent State rather than integration with an independent State. References to "associated States" in this paper do not, however, include the Northern Mariana Islands which might, to some extent, be regarded as an example, though not an ideal one, of "sustained autonomy". On 22 December 1990, the Security Council determined, in light of the new status agreements for the Federated States of Micronesia, the Marshall Islands and the Northern Mariana Islands, that the objectives of the Trusteeship Agreement had been fully attained, and that the applicability of the Trusteeship Agreement had been terminated, with respect to those entities (S/RES/683 (1990)).

remained responsible for the defence or foreign relations of the associated States mentioned above, in the way that they were responsible for those matters before the associated States became self-governing. Responsibility arises only in the comparatively few contexts where the associated State and the partner government regard themselves as a single international entity. When the focus is on the interests of the associated State as distinct from its bigger partner, the associated State is acknowledged to have its own international personality and, generally speaking, must take its own international initiatives, with, one hopes, support and practical help where appropriate from their partner State. If associated States become parties to treaties that require implementation in domestic law or administrative practice, they must themselves take the necessary steps to put the appropriate arrangements in place within their own self-contained legal systems.

This need for self-sufficiency can strain the resources of associated States as it does those of very small independent States. Naturally, they give priority to the bilateral and multilateral relationships, often regional, that seem to be of most immediate benefit. They are not always able to play a full part in observing and enjoying the benefits of world-wide networks of standard-setting international instruments in such fields as sea and air transport, the protection of the environment and human rights, to mention a few examples. The range of relationships with the international community may therefore be a good deal more limited than that which operated through the administering authority when the associated States were trust or non-self-governing territories.

Then there is the relationship with the partner State. The primary interest of the associated States is in continuing economic assistance.[3] In my earlier paper I concluded that, although economic assistance to all the associated States has overall been generous, it has been provided within a similar frame of reference as aid to independent States. This has meant an emphasis on development and perhaps eventual self-sufficiency, or at any rate decreased dependence, whether or not that goal is realistic. I posed the question whether the partner governments are really willing to contemplate sharing their resources with their small island associates for the foreseeable future, specially if this involves supporting a standard of living that the local economy cannot sustain, and without any close control over the spending. There appears to be little sense that associated States form part of the polity of the partner State and are therefore entitled as of right to a measure of financial support on an ongoing basis.

Finally, I described sources of stress within the associated States as their traditional social systems, cultural values and subsistence economies give way to goals of democratic government and a money economy. These stresses, arising from internal aspirations as well as external pressures, obviously exist also in small independent States and in some at least of the very small islands still to exercise their right of self-determination. I concluded, pessimistically perhaps, that free association has increased the pace of this inevitable process of change but has so far provided benefits which help to match the costs only in those associated States where the partner government has

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3 The people of the Cook Islands and Niue also place a high value on their New Zealand citizenship.

made a substantial investment in its own interests. The resulting impetus to the local economy has greatly outweighed the effects of everything provided by way of economic assistance.

I concluded that the present model of self-government in free association is in practice so close to independence as to be almost indistinguishable. Associated States are forced to maintain the same panoply of governmental institutions and to carry out the same comprehensive range of governmental activities, at home and abroad, as small independent States. The add-on benefits of free association for the associated State, mainly in the form of economic assistance, are, in the short term, quantified by negotiation and agreement with the partner Government. In the long term their continuation and level will depend on the recognition by the partner State, through its political processes, of a qualitative element in the relationship. The question arises whether that recognition will always be given.

V THE PROBLEMS WITH INTEGRATION

The essential elements of integration with an independent State as a choice for non-self-governing territories are set out in Principle VIII of the Annex to UNGA Resolution 1541 (1960):

> Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

This is a brief description of the classical model of the State, whether organised on a unitary or a federal basis. The sticking point is likely to be the final requirement: equality of rights of representation at all levels in the executive, legislative and judicial organs of government. The model assumes first, that the integrating territory is large enough for that representation to be significant, and secondly that the people of the integrating territory are sufficiently closely identified with those of the independent State concerned to make that representation acceptable and workable from the point of view of both sides.

The second, if not the first, was a feature of the integration of the former non-self-governing territory of the Cocos (Keeling) Islands with the Commonwealth of Australia - one of the few examples of integration within the precise terms of Article VIII. The islands, with a total area of about 14 square kilometres and a population in 1984 estimated at 559, are situated in the Indian Ocean approximately 2,770 kilometres north-west of Perth. As explained at the time, all relevant Australian legislation was made applicable to the Cocos people. They became able to vote in Australian federal elections and referendums. They acquired the same entitlements to health care and social security benefits as those available to mainland Australians. Their decision to integrate into a

physically remote, and ethnically and culturally very different society, was described as a decision[4]

> ... in effect, to join those Cocos Islanders who had left the territory to settle permanently in Australia. Integration therefore confirmed the bond which already existed between the elements of the Cocos community and between them and the broader Australian community.

The integration model does not, of course, require the application of uniform law throughout the constituent units, whether the difference stems from the exercise of local law-making powers, which may be considerable, or from distinctions made at the central government level at the request of the constituent unit. Dangers exist in assuming that the extension of social security benefits, in particular, on a uniform basis will necessarily benefit the people of small islands with a viable if not affluent subsistence economy. In the years immediately before self-government, Micronesian leaders begged the United States as administering power to cease the application of the federal food stamps programme throughout the Trust Territory. As the application of an income test set for United States conditions meant that a majority of the inhabitants of Micronesia qualified for the benefit, it sapped the will of whole communities to continue with their fishing and other food producing activities.

At the Port Vila seminar, Patricia Hyndman referred to a suggestion by James Crawford that federal states may be more willing to accommodate a degree of autonomy for integrated islands than are unitary and centralised states. He had in mind the relationship between Norfolk Island and Australia as compared with that between the Chatham Islands and New Zealand.[5] But if unitary States such as New Zealand may lack the imagination and will to recognise and accommodate, as they could well do within their flexible constitutions, the special needs of their offshore islands, federal States may have problems of their own, under their relatively rigid constitutions, in dealing with such difficult questions as the extent of local as distinct from federal rights to marine resources - a question which is likely to be of major importance for most small islands.[6]

In most cases, integration does not in itself solve, any more definitively than free association, the difficult question of the proportion of the partner or central government's resources that ought to be devoted to supplementing local revenues of small islands, particularly to help meet their special needs. The economies of scale applied to mainland communities to identify a critical mass for the purpose of allocating

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4 Statement made on 7 November 1984 by the Australian representative in the Fourth Committee of the United Nations General Assembly.

5 J Crawford "Islands as Sovereign Nations" (1989) 38 ICLQ 277, 284.

6 See letter dated 20 December 1990 addressed to the President of the Security Council by Lorenzo I De Leon Guerrero, Governor of the Commonwealth of the Northern Mariana Islands (Security Council document S/22034 of 21 December 1990, Annex I). Consider also the case of Nauru whose leaders rejected an offer of re-settlement on an uninhabited island off the coast of Australia because, under its terms, the Australian federal constitution and legal system would have applied.

funds for schools, hospitals, ports, airfields and other facilities cannot be applied to islands. Of necessity, they must, to a large degree, be self-contained. Even allowing for the differences in standards of living that must usually be accepted, they generally cost more per head of population to service adequately than mainland communities. Therefore, just providing the infrastructure may be disproportionately costly. And if sea or air transport is required over long distances of open ocean, safety requirements may make it difficult to provide this for a small population on a commercially viable basis.

Another problem of integrated offshore islands is that mainland agencies which are responsible for the provision of services may have difficulty in maintaining these at a reasonable level. The question then arises whether central government should continue to collect the island revenues which cover or go towards the costs of these services. Should it forego the right to do so and give the island government the legal powers to collect the revenues itself and so provide, as far as it can, for its own needs? And in that case should central government have any duty to make good any shortfall?

In short, integration may pose problems in recognising that the special needs of small islands justify special treatment. I found it ironic that, at a time when I was involved on behalf of Niue in a review of that associated State's relationship with New Zealand, and some Niueans were asking if Niue would be better off if it were to become integrated with New Zealand, some people in the Chatham Islands, integrated with New Zealand but then undergoing a similar review, were asking if the Chathams would be better off as a self-governing associated State. Perhaps the answer is a status for small islands that compensates for the inherent difficulties of island life by seeking to give them the best of both these worlds. I look now at how this might be done.

VI THE PRINCIPLES OF SUSTAINED AUTONOMY

Most small, non-self-governing islands wishing to terminate that status by entering into an ongoing, supportive relationship with an independent State will presumably contemplate doing so with the present administering authority, though such a relationship with another independent State, perhaps one in the same region as the island, is not of course excluded. I suggest that, in constructing the relationship, the parties should use the following principles as building blocks:

(a) the legislature of the island should have the full power to make laws for the island, except so far as it agrees to confer a law-making power on the legislature of the sustaining State in relation to any matter;

(b) the legislature of the sustaining State should have a residual power to make laws for the island, to the extent agreed to by the island, but excluding any power to tax the island's inhabitants or to derive revenue from licences to exploit its marine resources, such legislative power to be exercised only after consultation with the island;

(c) the government of the island should have full executive authority, including full authority in relation to external affairs, except so far as it agrees that the

sustaining State should have concurrent or exclusive executive authority in relation to any internal or external matter;

(d) the sustaining State should have a residual executive authority in respect of the island, to the extent agreed to by the island, to be exercised only after consultation with the island;

(e) the island should have a local court or courts of first instance for criminal and civil proceedings except those of major importance or difficulty, staffed by suitably qualified judges, including, if necessary, judges seconded from the courts of the sustaining State;

(f) the government and people of the island should have access to the superior courts of the sustaining State, perhaps sitting in the island, to hear serious cases and appeals, and in doing so those courts should apply the law of the island as it emanates from all relevant sources;

(g) the inhabitants of the island should be entitled as such to representation in the legislative, executive and judicial organs of the sustaining State only if so agreed with the sustaining State, taking account of all relevant factors;

(h) the sustaining State and the international community should recognise the international personality of the island and its capacity to make treaties and to be a member of international inter-governmental organisations, except so far as the island agrees that its international relations shall be conducted by the sustaining State;

(i) the inhabitants of the island should be nationals of the sustaining State and entitled to its diplomatic protection;

(j) the inhabitants of the island, if not automatically entitled to the right to reside and work in the sustaining State, should be accorded that right on a preferential basis;

(k) the inhabitants of the sustaining State should not be entitled as of right to reside and work in the island;

(l) the sustaining State should undertake to provide the island on an ongoing basis with economic and other assistance to assist it in achieving and maintaining a standard of living that is reasonable in the circumstances, without any expectation that the island will necessarily be committed to undertaking development programmes aimed at enabling it eventually to provide for itself without the continuing help of the sustaining State;

(m) other States and international organisations should assist the sustaining State in providing economic and other assistance to the island so far as their resources permit;

(n) the sustaining State should maintain in its territory, or, if agreed, in the territory of a third state, an organisation comprising persons of experience in the public and private business and other sectors of both the island and the sustaining State, and including, where appropriate, former inhabitants of the island who have settled in the sustaining State and their descendants, to advise the governments of both the island and the sustaining State in relation to the exercise of their rights and the performance of their obligations under the agreement between them, and to undertake such other activities on behalf of the island as may be agreed from time to time;

(o) the details of the agreement negotiated between the island and the sustaining State and the implementing legislative framework in the law of both the island and the sustaining State should be approved by the people of the island through an act of self-determination under United Nations supervision, on the understanding that the island is not precluded from choosing a different political status at some future time through a further act of self-determination;

(p) the sustaining State should undertake a treaty obligation to the United Nations or an appropriate regional agency or its members that, so long as the island carries out its own obligations under the agreement with the sustaining State in good faith, it will do the same, unless released by a further act of self-determination through which the people of the autonomous island choose another political status.

I shall now try, as briefly as possible, to explain the reasons for including each of these structural components and how they would operate in practice.

A Local Legislative and Executive Autonomy

The foundation stone is the legislative and executive autonomy of the island to the full extent that its people desire.[7] But, as already explained, the exercise by the island of the full array of governmental functions would require quite elaborate and perhaps disproportionately costly institutions. It may also call for professional and technical expertise which may not be readily available. Therefore the organs of government of the sustaining State should be at the disposition of the island, to make laws for it and to carry out executive functions, but only to the extent that the island does not wish to exercise those powers for itself, and only after appropriate consultation.[8] This is, of course, a reversal of the underlying assumption of colonial status, that the administering authority has full legislative and executive powers unless relinquished to the colony.

It would be a question whether, under the constitutional law of the sustaining State, the distribution of legislative and executive power could be left solely to a political agreement, each party refraining from exercising an unlimited legal competence except in accordance with the agreed terms, or whether restrictions on powers would need to be

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7 Principles (a) and (c).

8 Principles (b) and (d).

imposed by law. If so, it would be important for the courts, in interpreting and applying the restrictions, to take account of and give effect to their underlying purpose.

This was the approach taken in a case concerning the compatibility with the US Bill of Rights of provisions in the Northern Marianas Covenant and Commonwealth Constitution permitting restrictions on the right to acquire land of persons not of Northern Marianas descent. The federal appeals court said:[9]

> The legislative history of the Covenant and the Constitution indicate that the political union of the Commonwealth and the United States could not have been accomplished without the restrictions. ... Thus, application of the constitutional right could ultimately frustrate the mutual interests that led to the Covenant. ... Where land is so scarce, so precious, and so vulnerable to economic predation, it is understandable that the islanders' vision does not precisely coincide with mainland attitudes towards property and our ideal of equal opportunity in its acquisition.

The restrictions were therefore upheld.

B Borrowed Judges and Courts

It is even simpler, from a constitutional viewpoint, to provide small islands with help in filling judicial positions[10] - a form of assistance that is already made available in the Pacific to a number of independent as well as associated States. Lending the sustaining State's judicial institutions to the island[11] is also straightforward.[12] But in such cases it is important for the borrowed court to think of itself as operating within the particular circumstances of the jurisdiction whose law it is required to apply.

C Optional Participation in the Sustaining State's Democratic Processes

I have suggested that, contrary to the tenets of integration as set out in principle VIII of UNGA Resolution 1541 (1960), representation in the sustaining State' s legislative, executive and judicial organs should not be mandatory.[13] The population numbers are likely to be so disproportionate that representation through the right to vote in an electoral district of the sustaining State, even if feasible in terms of shared language, culture and political interests and relatively easy physical access to the island for the member of the legislature who represents it, may not in practice mean much.

It is a question whether the treatment accorded by the central government of New Zealand to the Chatham Islands, for example, is significantly affected by the fact that its 560-odd adults are entitled to vote in a mainland electorate comprising 26,000 registered

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9 *Wabol* v *Villacrusis* 958 Fed Rep (2d) 1450, 1461-62 (9th Cir 1990). Certiorari was denied.

10 Principle (e).

11 Principle (f).

12 Especially for a country like New Zealand whose highest court is still the Judicial Committee of the Privy Council.

13 Principle (g).

voters. The extreme case would be the representation in the British House of Commons, through the right to vote in an English electorate, of the adults among the 59 people who in 1990 made up the total population of Pitcairn! So far as they are not within the control of the local governments of autonomous islands themselves, the rights of their usually small populations seem likely to be better secured by contractual guarantees given by the government of the sustaining State than by participation from a distance in its political processes.

D International Personality for Autonomous Islands but Residual Power to Act on Their Behalf

It will be important for small autonomous islands to be able if they wish to escape any necessary implication that the sustaining State, and it alone, will remain responsible for their international relations as if they were still colonies.[14] Small islands, even if they are not independent, should be able to take a full part in regional activities and play a part on a wider international scene if they so desire. Other States and international organisations should recognize their competence to do so.

This is not a novel idea. In developing the draft articles on the law of treaties which became the basis of the Vienna Convention, the International Law Commission recognized that the component units of federal States might have the capacity to exercise treaty-making powers.[15] I suggest that, in an era when formerly monolithic regimes in Eastern Europe are fragmenting into national units with varying degrees of autonomy, international law will accommodate their enjoyment of international personality and their exercise of treaty-making powers more readily than it might have done in earlier times when the main focus was on the rights and duties of independent States.

On the other hand, small islands should not be left to look after their own international relations unaided.[16] The assistance they require goes well beyond considering as a side-issue how the island might be affected by a particular multilateral treaty when the sustaining State is considering the implications of its own participation. The interests of an increasingly interdependent international community

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14 Principle (h). The wording of s 5 of the Cook Islands Constitution Act 1964 and of s 6 of the Niue Constitution Act 1974, the Acts of the New Zealand Parliament under which the Cook Islands and Niue respectively became self-governing, inserted on the initiative of some members of Parliament out of an excess of caution, has fostered some misconceptions on this point.

15 Draft Articles on the Law of Treaties with Commentaries, adopted by the International Law Commission at its Eighteenth Session, *Yearbook of the International Law Commission* (1966) vol II. See Draft Article 5, paragraph 2 and Commentary, paragraph (5). A provision to the same effect was adopted by the Committee of the Whole at the First Session of the Vienna Convention on the Law of Treaties (*Official Records,* 209), but was not included in the final text.

16 This is the other element of principle (h).

require all territorial entities, whatever their political status, to receive the benefits and accept the obligations of all applicable international instruments.[17]

In considering whether and how they should do so, small islands need the advice and assistance not only of the foreign offices but also of other agencies of the sustaining State, as well, possibly, of its residual treaty-making, law-making and administrative powers. I discuss below the mechanism through which this kind of assistance from mainstream agencies might be channelled.

E Nationality and Residence

The people of autonomous islands will for some purposes wish to establish a separate identity as islanders, distinguishing themselves even from people born in the island who have settled in the sustaining State or elsewhere. But for other purposes they should be able to claim also the nationality of the sustaining State. As a minimum, the sustaining State must be able to extend to them, in third countries, its right of diplomatic protection.[18] It may be appropriate also that they qualify for most-favoured-nation or analogous treatment under multilateral or bilateral treaties or reciprocal arrangements entered into by the sustaining State.

The internal law of the sustaining State will determine whether they qualify for full rights of citizenship. At the least, they should have preferential rights of entry to the sustaining State for residence and work.[19] Once there, they should be entitled without discrimination to the protection of its laws, as well as the right to qualify for the right to vote on a basis no less favourable than other immigrants. The sustaining State, with which they will in most cases already have long-established links, is an essential outlet for study, work experience and out-migration for the people of very small islands, especially those which have a rapidly expanding population.

It does not follow that the population of the sustaining State should, in return, have an unlimited right of access to the island to reside or work, or should be entitled to purchase land there.[20] As already noted, land in small islands is likely to be a scarce resource, and the island's culture and economy may be too fragile readily to accommodate any kind of large-scale incursion, even for such transitory purposes as

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17 At this seminar, papers were invited on the implications for small island territories of such matters as drug trafficking and money laundering, issues pertaining to the environment and to development, international and regional cooperation in order to mitigate the effects of natural disasters, questions relating to the law of the sea and the preservation and protection of marine resources from over-exploitation, the role of the specialized agencies and international and regional organisations, sea and air transport and enhancement of the role of women. These are examples of the many important areas of regional and world-wide cooperation in which small islands may need to play their part, in some cases by acquiring rights and obligations under the relevant international instruments.

18 Principle (i).

19 Principle (j).

20 Principle (k).

tourism. It must be left to the people of the island to decide for themselves from time to time how far they wish to open their door to outsiders and for what purposes. They should never be forced to do so as the explicit or implicit price of ongoing economic and other assistance from the sustaining State.

F Economic and Other Assistance

The right to ongoing economic and other assistance from the sustaining State is the greatest need of all for small islands.[21] It must therefore be articulated clearly, even more clearly than it has been so far in relation to the small islands that have become UN-approved, freely associated States.

The reference to "other" assistance is intended to point up the fact that small islands are likely to need kinds of help that money alone cannot buy. They need the benefit of institutional as well as individual expertise, experience and initiatives. That means that they must be in a position to draw on the resources of mainland public sector agencies and perhaps some private sector enterprises and institutions. These bodies, in turn, must be prepared (no doubt for a fee) to focus on and help to provide for the needs of the island, not from a mainland perspective but from that of the island. It may be thought that this is asking a lot. Yet a sense of altruistic concern for the well-being of the peoples of small islands is not absent from such colonial administrations as still exist. Working relationships that at present benefit small islands should not be lost by a move to a new political status.

That proposition applies, of course, to the financial resources that administering authorities are at present devoting to the small islands for which they are responsible, under the spur of UN supervision as provided for in the Charter. Unless it can really be shown that a small island has reached - without being pushed to do so against its will - a stage of development where it can provide adequately for its own needs, there seems no good reason why the administering authority, if it assumes the new role of sustaining State, should not continue to provide at least the same level of assistance as it did before. If that level was inadequate, there will be a good case for increasing it.

An improvement in the standard of living in the island or an increase in its internal revenue should not necessarily be a reason for the sustaining State to reduce assistance levels. Islands should not be held to a certain stage of development and no more, though, as I have mentioned, they must usually accept less than mainland standards. On the other hand, the sustaining State should not necessarily be required to bear alone the whole burden of providing economic and technical assistance.[22] Other States, the specialised agencies and international organisations should be prepared to provide the same kind of assistance as they would to independent States with a similar need.

The sustaining State will need to be careful that, in specifying the purpose for which assistance is made available and insisting on proper accountability for its application, it

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21 Principle (l).
22 Principle (m).

does not usurp the autonomy of the island. The island must decide its own priorities through its own political processes. It should also be left to demonstrate through its own public accounting mechanisms[23] that it has put the funds provided to proper use.

Setting up a trust fund for the island may achieve freedom from undue political intervention and longer term certainty than annual appropriations allow, as well as attracting contributions from other sources.[24] But a capitalisation of what would otherwise be annual grant funds cannot be regarded as satisfying the sustaining State's financial responsibilities once and for all. Islands that receive assistance are always being told that they have to share the impact of hard times being experienced by the donor government; if so, they are also entitled to share the benefit of better times in the future.

G A Supporting Organisation in the Sustaining State

In the hey-day of colonialism, most administering powers maintained a colonial office or its equivalent. Whatever its defects in terms of imposing outside authority, it at least had the advantage of being focussed on the practical needs of dependent territories and being reasonably well-equipped to meet them. With the demise of these bureaucracies, there is something of a vacuum. In my experience, departments of foreign affairs, with their primary focus on relations with other independent States, usually have difficulty in giving the necessary priority and expertise to the affairs of small islands. Departments of internal affairs are at an equal disadvantage because they are not familiar with the international developments on which the autonomy of small islands rests, nor with the special needs which distinguish islands from mainland communities. Other agencies such as those concerned with health and education, housing and employment

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23 Assisted perhaps by outside audit.

24 Compare the Tuvalu Trust Fund set up as a capital investment fund to provide a substantial degree of stability in the funding of essential government services. See 1987/4 New Zealand Foreign Affairs Review 35 (October/November 1987) describing the fund and the donations by Australia, New Zealand and the United Kingdom. Other donors have since made contributions. Compare also the Chatham Islands Enterprise Trust established by the New Zealand Government by Deed dated 1 December 1991. In general terms the Trust is obliged to take over and operate specific commercial activities previously carried on by Government and by the County Council. It holds these assets, together with a total of $8 million ($4 million expected to be paid) from Government, and other assets to be transferred (principally fin fish quota) on trust for the people of the Chatham Islands. It was explained that the Trust does not budget or plan for any activity or trading company to run at a loss; but where a loss does arise from trading the Trust must then fund that loss from its general resources. It is expected that some activities will not be capable of making any profit for some years to come. Some major facilities, such as the runway or the wharf, may never be capable of paying their way and may have to be supported by the profits from other activities. *The Chatham Islander,* September 15 1992, 6. See also Report to the Minister of Internal Affairs of the Interim Board for the Chatham Islands Local Authority Trading Enterprise (November 1992).

are capable of making a valuable contribution to the wellbeing of islands, but their assistance needs to be specifically arranged.

That is why I have proposed, as an essential element, the setting up of a special organisation to help service small islands.[25] Its function should be to facilitate the working of the relationship between the island and the sustaining State through its own efforts and by harnessing the energies and expertise of mainland public and private sector agencies on behalf of the island. It should be able to advise both governments. If so agreed, it might also have certain operational responsibilities, including those for the disbursement or investment of funds.

This organisation, dedicated to the well-being of the island and to making the relationship with the sustaining State work, must have the ear and the goodwill of relevant public sector agencies. People belonging to the island must play a major part, but in most cases people with other skills and experience will need to be drawn in. Probably it should include some from relevant public sector agencies in the sustaining State, as well as some from the private sector with the kinds of business and other experience that the island needs. And if the people of the island are a distinct ethnic group, members of which have settled in the sustaining State, it should almost certainly include some people from that community.

The maintenance of close ties between island and mainland communities helps to ensure that the flow of people is not in one direction only. Two-way traffic can be a source of inspiration and renewal for small islands, even if the mainlanders only stay for a time and then return. And islanders who have become mainland settlers and their descendants need to maintain contact with their home island as the reservoir of their language and culture. If they lose those things, it will, I suggest, be harder for them to be good citizens of their adopted country. Of course there will at times be differences of perspective between the two communities. Sometimes those who have left do not realise that things have changed in their absence. On their return they can have a double sense of loss - of the old ways that they remembered and of the mainland ways that they have learnt to enjoy.

H An Act of Self-Determination

If a small, non-self-governing island wishes to end that status by choosing autonomy supplemented by a relationship with a sustaining State of the kind I have outlined, its people should approve that choice in an act of self-determination supervised by the United Nations.[26] That is what they would do if the choice were to be independence, or other forms of free association or integration. But just as the people of a freely associated State have the right to move to a different status by a further act of self-determination,[27] so also should the people of an autonomous island.[28] Here they

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25 Principle (n).

26 Principle (o).

27 See for example UNGA Resolution 2064 (XX) recognizing the decolonisation of the Cook Islands which contained the following provision:

would have an advantage compared with the people of an integrated island. Unless its right to secede is acknowledged beforehand, a proposal to change the status of an integrated island may be seen as a rebellion against the State's authority. An autonomous island's explicit right to a further act of self-determination means that, for it, that issue cannot arise.

I A Sustaining State's International Obligation to Provide Continuing Support

In the paper I gave at Port Vila, I concluded that the relationship of free association, as at present explicitly approved, is an inter-governmental one, founded on full constitutional autonomy,[29] and governed primarily by international law concepts. For an autonomous island, the links with the sustaining State would be primarily constitutional, but with an important contractual element.

I have already suggested that the principles underlying this contract, to the extent that it is justiciable, ought to find ready acceptance in the courts of the sustaining State, whether applying the law of the island or the law of an entity comprising both island and mainland. But not all legal systems regard the contractual arrangements on which the authority of the State is founded as part of the law of the land. And in any case the agreement between the sustaining State and the island will necessarily require for its implementation an ongoing process of quantifying the amount and kinds of assistance that the sustaining State is to provide and deciding how this assistance is to be made available - a matter more for the political processes of the sustaining State than for its courts.

International law will, I suggest, support the autonomy of islands which have entered into a relationship with a sustaining State on the basis of Charter principles, but there is likely to be a question whether the agreement between them would be regarded as a treaty.[30] In any event the inequality of power between sustaining State and island

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[The General Assembly]

6 *Reaffirms* the responsibility of the United Nations, under General Assembly Resolution 1514 (XV) to assist the people of the Cook Islands in the eventual achievement of full independence, if they so wish, at a future date.

28 This is also an element of principle (o).

29 Though perhaps with constitutional links such as allegiance to a common Head of State and shared citizenship.

30 In its Commentary on Draft Article 5(2) on the law of treaties, the International Law Commission said:

> Agreements between two member states of a federal State have a certain similarity to international treaties and in some instances certain principles of treaty law have been applied to them in internal law by analogy. However, those agreements operate within the legal regimes of the constitution of the Federal State, and to bring them within the terms of the present articles would be to overstep the line between international and domestic law. *Yearbook of the International Law Commission, 1966*, vol II, Draft Article 5(2), Commentary, paragraph (5).

may mean that it would be difficult for the island to invoke against the sustaining State such sanctions as international law provides for the observance of treaty obligations.

It is important that autonomous islands should not find themselves in a no-man's land between the full protection of the sustaining State' s constitution and other laws on the one hand and of international law on the other. I propose therefore that the international community, through its global or regional organisations, should become the guarantor of the continuation of the necessary support for small autonomous islands. As a condition of the termination of non-self-governing status, the sustaining State would be required to enter into a treaty obligation with the organisation concerned, or possibly with its member States, to the effect that it will observe the terms of its agreement with the island and undertake its continuing support, in conjunction with other members of the international community.[31] In addition to holding the sustaining State to its obligations, such a treaty would have the advantage of explicitly recognizing the international personality of the island within any limits set out in the agreement.[32]

Such a system would replace the protection formerly given to small islands by the international trusteeship system and still available to non-self-governing islands under the Charter. It would also parallel the international obligations which States undertake towards their own citizens under ILO treaties, international human rights instruments, and the developing norms concerning the rights of indigenous peoples. Whether, like some of these, it should incorporate a reporting mechanism would be a matter for further consideration .

VII IS SUSTAINED AUTONOMY AN OPTION WHICH THE UNITED NATIONS SHOULD APPROVE?

Finally, I would argue that United Nations organs have the authority to consider a political status for small islands, as an alternative to the permitted options of free association, as at present interpreted, or integration, simply because it is common sense to respond to a demonstrated need. It is not surprising that, in 1960, when the focus was mainly on the swift decolonisation of the large areas of the globe that were clearly destined to become independent, little attention was paid to considering how the other options then expressly contemplated would work out in practice for the smallest and most vulnerable of the non-self-governing territories. With the first part of the task largely accomplished, there is good reason now to reconsider the options which should be available to very small islands.

But if some further warrant is required, it can perhaps be found in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations

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31 Principle (p).

32 See principle (h).

(Declaration on Principles).[33] My compatriot and colleague, Roger Clark, has pointed out that[34]

> [t]he Declaration on Principles harks back to Resolution 1541, and even to Resolution 742, with these words: "The establishment of a sovereign and independent State, the free association or integration with an independent State *or the emergence into any other political status freely determined by a people* (his emphasis) constitute modes of implementing the right of self-determination by that people".

Professor Clark concludes that, although the reason for the inclusion of the emphasized words remains mysterious, they seem to permit a closer relationship with the metropolitan power than does "free association".[35]

VIII CONCLUSION

My considered conclusion is that there are good policy reasons why the special Committee, the administering authorities of small, non-self-governing islands and the peoples of those islands themselves should consider whether sustained autonomy on the basis outlined in this paper[36] would have something to offer them that the other recognised options may lack. Nothing in international law or United Nations practice appears to stand in the way of recognising this further option for the small islands concerned.

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33 UNGA Resolution 2625 (XXV) (1970).

34 Roger S Clark "Self Determination and Free Association - Should the United Nations terminate the Pacific Islands Trust?" (1980) 21 Harvard International LJ 1, 64.

35 Above n 34, 64-65.

36 In her oral presentation of her paper at the Port Moresby seminar, the author explained that she had chosen to emphasise the difference between the present Pacific model of self-government in free association and other possible versions of that status by coining the term "sustained autonomy".. She then went on to say

> But perhaps I should emphasise, even more than I have done in my paper, that its elements fit within the spirit of the reference to free association in Resolution 1541, as well as the reference to "emergence into any other political status freely determined by a people" in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States. That sense of movement in the interpretation of Resolution 1541 seemed to emerge clearly from the statements made this morning.